



2-1-1966

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Recommended Citation

Jason C. Blackford, *Survey of Section 2(a) of the Robinson--Patman Act*, 41 Notre Dame L. Rev. 285 (1966).

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A SURVEY OF SECTION 2(a) OF THE ROBINSON-PATMAN ACT*

*Jason C. Blackford***

The primary statutory prohibition against price discrimination in the sale of like commodities by sellers engaged in interstate commerce is contained in section 2(a) of the Robinson-Patman Act.¹ Section 2(a) is now the main weapon in the arsenal of the Federal Trade Commission and of potential pri-

* Although not presented at the Robinson-Patman Conference at the University of Notre Dame, this article has been included to complement the articles written by Mr. Van Cise and Mr. Mayer on section 2(a) of the act.

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1 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1964). Section 2(a) provides:

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

vate litigants to protect competition and individual competitors from the adverse effects of price differentials quoted by sellers for the same commodity.

It is not the purpose of this article to challenge the policy of prohibiting price differentials or the method by which the Robinson-Patman Act attempts to regulate price discrimination. This article is a survey of the elements required to establish a *prima facie* case under section 2(a) of the act and of the pertinent defenses thereunder. Emphasis will be directed toward developing an outline of the statutory requirements of section 2(a) and their interrelationship. To create the proper perspective for this survey, a brief analysis of the legislative history and of the key conceptual problems will be undertaken.

I. Historical Perspective

The impetus to the passage of the Robinson-Patman Act came from the depressed economic conditions of the 1930's and the growth of chain stores, particularly in the retail food industry.² The small marketers were convinced that the larger chain store organizations were using their buying power coercively to extract substantial price reductions which were not justified by any cost savings. The Federal Trade Commission's *Final Report on the Chain Store Investigation*³ lent some credence to that belief. The oligopsonistic power of the chain store organizations was not subject to the prohibitions of the Sherman Act⁴ against economic power, since the chain store organizations constituted only a small percentage of their relevant line of commerce. The provisions of the original Clayton Act⁵ were inadequate to cover such practices.⁶ After protracted hearings and extended debate amidst active lobbying by numerous trade associations and pressure groups, the Robinson-Patman Act, replacing section 2(a) of the Clayton Act, was enacted in 1936.⁷

Although the lobbying and the conflicting opinions expressed by the legislators tend to obscure the legislative intent, it is clear that this act was designed to protect the smaller firms from their larger suppliers and larger customers. Instead of taking direct action against the economic power of the larger suppliers and larger customers, the Robinson-Patman Act regulates differentials in the prices of the same commodity. This is the only federal antitrust statute which directly tampers with the price mechanism.

One of the key conceptual issues in this area was whether the control of prices was a proper method of preventing price discrimination. Some claimed that the real evil was the economic power of individual buyers and sellers.⁸ Because of the market power analysis inherent in the Sherman Act and the

2 For an excellent perspective of the legislative origins, see PATMAN, *COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT* (1963).

3 S. Doc. No. 4, 74th Cong., 1st Sess. (1935).

4 26 Stat. 209 (1890), as amended, 69 Stat. 282 (1955), 15 U.S.C. § 1 (1964).

5 Ch. 323, § 2, 38 Stat. 731 (1914).

6 ROWE, *PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT* 6-7 (1962).

7 PALAMOUNTAIN, *THE POLITICS OF DISTRIBUTION* (1955). See 79 CONG. REG. 11573-76 (1935); 80 CONG. REG. 3447 (1936).

8 See, e.g., Dirlam & Kahn, *Anti-Trust and the Big Buyer: Another Look at the A & P Case*, 60 J. POL. ECON. 118 (1952); Burns, *The Anti-Trust Laws and the Regulation of Price Competition*, 4 LAW & CONTEMP. PROB. 301 (1937).

Clayton Act, it was argued that enforcement of the then existing legislation was preferable.

Another fundamental problem was that of harmonizing the Robinson-Patman Act with the other federal antitrust laws. A strict application of the prohibitions of the act would, in all probability, foster a price uniformity and a rigidity that would conflict with the purposes of the Sherman and Clayton Acts. In *Automatic Canteen Co. of America v. FTC*⁹ the Supreme Court resolved this issue in favor of the Sherman Act. This concord was achieved by evaluating the effects of the price differential on "competition" rather than by injury to specific competitors. Such an approach is seemingly contrary to the act's legislative intent which was to protect small firms from the pricing practices of the chain stores.

On a practical rather than conceptual level, most of the difficulties under section 2(a) arise out of the lack of precision and clarity of its language. Two members of the Supreme Court have observed that the Robinson-Patman Act is "a singularly opaque and elusive statute." For the practitioner, this literary obscurity is not only frustrating but creates confusion where certainty is a necessity. This caveat must be kept in mind in the analysis of the statutory framework of section 2(a).

II. The Statutory Structure of Section 2(a)

The intricate provisions of section 2(a) provide not only a detailed outline of jurisdictional elements for price discrimination by a seller but also the built-in defenses. Basically, section 2(a) condemns a seller making sales in interstate commerce to two or more different purchasers of commodities of like grade and quality at a price difference which produces a competitive injury. For simplicity, these elements may be classified as follows:

- 1) *Seller*
- 2) *makes sales*
- 3) *in interstate commerce*
- 4) *to two or more different purchasers*
- 5) *of commodities*
- 6) *of like grade and quality*
- 7) *at a price difference*
- 8) *which produces a competitive injury.*

When all of these elements have been proved a prima facie violation of the act has been established. The seller can then avail himself of several defenses, including the good faith meeting of competition defense of section 2(a)¹⁰ and

⁹ 346 U.S. 61 (1953).

¹⁰ Section 2(b) of the Robinson-Patman Act provides in pertinent part:

... nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1964).

cost-justification defense of section 2(a).¹¹ A seller who illegally discriminates in price and is unable to justify his action subjects himself to FTC proceedings, to private treble damage actions and, in certain situations, to criminal sanctions.

III. The Establishment of a Prima Facie Case

Each word of the eight elements must be examined with care since each phrase has evolved a specific meaning which is often not apparent from a literal reading of the section. A clear understanding of each of these elements is imperative since the prohibitions against price discrimination are inapplicable unless *all* of these elements are established.

A. Seller

Price differences are not subject to the prohibitions of section 2(a) unless the different prices can be attributed to the same seller. The problem typically arises when a parent and its sales subsidiary offer the same commodity for sale at different prices. If the parent controls and directs the price at which the subsidiary markets the commodity, then the parent and the subsidiary will be deemed to be the same seller. What is considered to be control is dependent upon the facts. The courts require a showing of absolute control of the parent over price before attributing the subsidiary's price to the parent.

In *Baim & Blank, Inc. v. Philco Corp.*¹² an individual retail dealer was quoted a higher price by Philco's sales subsidiary than Philco was offering to a large chain. The court dismissed the complaint because the sales of the subsidiary were not attributed to the parent, in spite of the fact that the subsidiary was wholly owned and, with one exception, the officers were the same. The court stated:

As appears from the depositions, however, there were no consultations between parent and subsidiary in respect to establishing pricing policies to compel the conclusion that the prices of both companies were controlled by Philco, or that they acted in legal effect as one seller.¹³

The Seventh Circuit approved the above rationale in *National Lead Co. v. FTC*,¹⁴ and made the test even stricter by requiring "such complete control of the subsidiary as to render the former [subsidiary] a mere tool of the latter [parent]."¹⁵ The same test and rationale have been applied to independent distributors of a supplier.¹⁶

11 Section 2(a) of the act contains the following proviso:

. . . [N]othing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . .

49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1964).

12 148 F. Supp. 541 (E.D.N.Y. 1957).

13 *Id.* at 544.

14 227 F.2d 825 (7th Cir. 1955), *rev'd on other grounds*, 352 U.S. 419 (1957).

15 *Id.* at 829.

16 *Massachusetts Brewers Ass'n v. P. Ballantine & Sons Co.*, 129 F. Supp. 736 (D. Mass. 1955).

B. Sales

The requirement of "sales" has removed many commercial arrangements from the prohibitions of section 2(a). A seller may lease, license, lend or consign commodities without fear of violating section 2(a). For example, in *Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Center*¹⁷ the court held that a real estate lease was not subject to the price discrimination provisions of the Robinson-Patman Act.

In *Students Book Co. v. Washington Law Book Co.*¹⁸ the court sustained the dismissal of a treble damage action on the grounds that the discrimination between customers and consignees was not subject to the prohibitions of the act since a consignment was not a sale.

The courts have also required the price difference to involve sales that were relatively contemporaneous in time. The minimum time span is dependent on the particular circumstances of the transaction, such as the type of product and the general custom of the market.¹⁹ For example, in *Atlanta Trading Corp. v. FTC*²⁰ a five-month time lapse between the sales of hams by a supermarket was held to be too long to bring them under the act.

C. Commodities

When the fact of sales has been established, it is still necessary to demonstrate that they involved "commodities." The word commodity has assumed a special significance which has tended to confine the scope of 2(a) to tangible property. Representative Patman in his *Complete Guide to the Robinson-Patman Act* made the following interpretation:

... [T]he word [commodity] is ordinarily used in the commercial sense to designate any moveable or tangible thing that is produced or used as the subject of barter. This is the definition of the word "commodity" used in the application of the Robinson-Patman Act.²¹

Such a definition excludes such things as services, intangibles, real estate²² and transportation.²³ The main area of controversy has centered around items that are part tangible and part intangible.

For example, in *General Shale Prods. v. Struck Constr. Co.*²⁴ the Sixth Circuit was faced with a price quotation for a construction job. An admittedly discriminatory price for the bricks was included as a part of the bid, but the bricks were held to have become a nondivisible factor in the bid, which was not a commodity. To generalize, price quotations which combine tangible elements with dominant intangible facts are not commodities within the meaning of section 2(a).

17 219 F. Supp. 400 (W.D. Pa. 1963).

18 232 F.2d 49 (D.C. Cir. 1955), cert. denied, 350 U.S. 988 (1956).

19 ROWE, *op. cit. supra* note 6, §§ 5.1-5.6.

20 258 F.2d 365 (2d Cir. 1958).

21 PATMAN, *op. cit. supra* note 2, at 33.

22 *E.g.*, *Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Center*, 219 F. Supp. 400 (W.D. Pa. 1963).

23 *Fleetway, Inc. v. Public Serv. Interstate Transp. Co.*, 72 F.2d 761 (3d Cir. 1934), cert. denied, 293 U.S. 626 (1935).

24 132 F.2d 425 (6th Cir. 1942), cert. denied, 318 U.S. 780 (1943).

Another important issue is whether advertising is a commodity under the act. In *Columbia Broadcasting Sys. v. Amana Refrigerator, Inc.*²⁵ the court held that a television advertisement was not subject to the Robinson-Patman Act. The following analysis was made:

Moreover, we are of the opinion that the most reliable guide to the meaning of the word "commodity" is the context in which it is employed and in our considered judgment the context here—goods, wares, merchandise, machinery and supplies—does not permit an application of the term which embraces the contractual right or privilege of sponsorship identification with the broadcast of a television program and the use of a portion of the broadcast time for product advertising.²⁶

Judicial dicta in other cases tend to prevent a clear answer.²⁷ It is submitted that radio and television advertising should remain subject to the scrutiny of the Federal Communications Commission, which has been specially constituted and has a degree of expertise for such a task.

As a matter of economic sense and statutory construction, section 2(a) should be confined to those items which are dominantly tangible property. To impose the prohibitions of price discrimination on intangibles is to plunge into a morass of problems, such as determining the grade and quality of an intangible. There are enough problems in the Robinson-Patman Act without inviting more.

D. Commerce

The cases recognize a distinction with respect to "commerce" under the Robinson-Patman Act and under the Sherman and Clayton Acts. In an action brought under the Robinson-Patman Act, it is necessary to allege and prove that the transactions complained of were actually in interstate commerce.²⁸ However, under the Sherman Act and the Clayton Act the transactions must affect interstate commerce.²⁹

Under section 2(a) there are three separate aspects to the requirement of interstate commerce: (1) the seller must be "engaged in commerce"; (2) the discrimination in price must occur "in the course of such commerce"; and (3) at least one of the sales must be a transaction "in commerce." If one of the discriminatory sales is made "in commerce," it follows that the seller must be "engaged in commerce" and that the discrimination will have occurred "in the course of such commerce." Thus, to apply section 2, one of the sales involving the price differential, either the higher or the lower price, must cross a state line.

The landmark case involving the interstate commerce aspect of the Robinson-Patman Act is *Standard Oil Co. v. FTC*.³⁰ Standard Oil contended that the storage of gasoline in the same state where it was eventually marketed deprived the gasoline of its interstate character. The Supreme Court rejected

25 295 F.2d 375 (7th Cir. 1961).

26 *Id.* at 378.

27 *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 609-10, n.27 (1953); *Syracuse Broadcasting Corp. v. Newhouse*, 236 F.2d 522, 527 (2d Cir. 1956).

28 Section 1 of the Clayton Act defines "commerce." 38 Stat. 730 (1914), 15 U.S.C. § 12 (1964).

29 See BAUM, *THE ROBINSON-PATMAN ACT: SUMMARY AND COMMENT* 11-13 (1964).

30 340 U.S. 231 (1951).

this contention by applying the "flow of commerce" concept since the gasoline had been refined in Indiana and was then shipped to Michigan upon order.

Despite the flow of commerce doctrine, price differentials by an interstate organization on commodities which are produced and sold within the borders of a single state are not prohibited by the Robinson-Patman Act.³¹ The dairy industry has attempted to use the interstate requirement to exempt certain price quotations from the restriction of section 2(a). In *Willard Dairy Corp. v. National Dairy Corp.*³² a small local processor and seller of dairy products instituted a treble damage action against a large interstate dairy organization which had invaded the smaller firm's domain with discounted milk prices. Judge Shackelford dismissed the plaintiff's complaint on the ground that the challenged sales by National Dairy were intrastate in character:

In the present case, the price discrimination relied upon was by reason of sales in the area of competition and sales in and around the City of Marion, Ohio. These sales by the defendant were from defendant's processing plant in Shelby, Ohio, and were purely intrastate transactions, not interstate in character, as is necessary to impose liability under the Robinson-Patman Act. The fact that defendant also made interstate shipments from other than its Shelby, Ohio, plant to areas in which the plaintiff did not engage in business is immaterial to the issue in this case.³³

The view that not all transactions by an interstate business are subject to the Robinson-Patman Act has been articulated by at least one member of the FTC and has been approved by several courts in cases involving the dairy industry.³⁴ In the recent *Cream-Crest Blanding Dairies Inc. v. National Dairy Prods. Corp.*³⁵ case, the court confirmed that section 2(a) did not cover a multistate operation's transactions which were entirely within one state. Also, the court ruled that the interstate shipment of orange juice from the same plant did not lend an interstate character to the local sale of milk.

From the cases it appears that the commerce requirement will be circumvented if the price discrimination is predatory or territorial in nature. The Supreme Court overlooked the interstate sale requirement in *Moore v. Mead's Fine Bread Co.*³⁶ The plaintiff, who was a local baker, attempted to obtain an exclusive arrangement with the Santa Rosa, New Mexico, merchants. In response to this Mead, a large interstate organization, cut its wholesale price in Santa Rosa but maintained its price elsewhere. Justice Douglas stated:

We think that the practices in the present case are also included within the scope of the antitrust laws. We have here an interstate industry increasing its domain through outlawed competitive practices. The victim,

31 *E.g.*, *Central Ice Cream Co. v. Goldenrod Ice Cream Co.*, 287 F.2d 265, 267 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961).

32 309 F.2d 943 (6th Cir. 1962).

33 *Id.* at 946.

34 *Borden Co. v. FTC*, 339 F.2d 953 (7th Cir. 1964); *Central Ice Cream Co. v. Goldenrod Ice Cream Co.*, 184 F. Supp. 312 (N.D. Ill. 1960), *aff'd*, 287 F.2d 267 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961). *Contra*, *Hipps v. Bowman Dairy Co.*, TRADE REG. REP. (1950-1951 Trade Cas.) ¶ 62859 (N.D. Ill. 1951).

35 243 F. Supp. 331 (1965).

36 348 U.S. 115 (1954).

to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources If this method of competition were approved, the pattern for growth of monopoly would be simple.³⁷

A similar analysis was made in *Shreveport Macaroni Mfg. Co. v. FTC.*³⁸ It is submitted that this is a misconception of the scope of the act. The character of commerce should not be altered by the character of the price discrimination. Perhaps a logical system of trade practices regulations might dictate such an approach, but this is not the language of the statute.

E. Purchasers

At first, the requirement that the illegal sales be made to two or more different customers appears devoid of any intricacies which might produce problems. This is not true.

As a corollary to the rule that an independent subsidiary's prices will not be attributed to a parent, the FTC has developed the doctrine of the "indirect purchaser," which treats the customers of a controlled distributor as customers of the original supplier. Under the theory, a price differential between the supplier's own customers and the supplier's distributor can be subject to section 2(a).

This doctrine developed from a series of cases beginning with *Kraft-Phenix Cheese Corp.*³⁹ Customers of distributors were held to be indirect purchasers of the supplier when the supplier actually solicited the customer and enforced his pricing policies on the distributor. In *Whitaker Cable Corp.*⁴⁰ the FTC applied the guideline that sufficient control for the application of this doctrine existed when the sales by the distributor were, in all respects, sales by the supplier. At least one court has followed this test. In *Klein v. Lionel Corp.*,⁴¹ a private treble damage action, the court dismissed the complaint, finding that the defendant had insufficient control over the wholesaler from whom the plaintiff had purchased. Hence the plaintiff was not an "indirect purchaser."

The most recent application of this doctrine was in *Purolator Prods., Inc. v. FTC.*⁴² Judge Hastings stated, "If a seller can control the terms upon which a buyer once removed may repurchase the seller's product from the seller's immediate buyer, the buyer once removed is for all practical, economic purposes dealing directly with the seller."⁴³ By the use of the doctrine, the court upheld the FTC in prohibiting a price discrimination as between two groups of jobbers who bought not only from the seller but also from the seller's warehouse distributors. The doctrine has also been applied extensively in section 2(d) cases.

F. "Like Grade and Quality"

Section 2(a) of the Robinson-Patman Act requires that the outlawed

37 *Id.* at 119.

38 321 F.2d 404 (5th Cir. 1963).

39 25 F.T.C. 537, 546 (1937).

40 51 F.T.C. 958, 973 (1955), *aff'd*, 239 F.2d 253 (7th Cir. 1956).

41 237 F.2d 13 (3d Cir. 1956).

42 5 TRADE REG. REP. (1965 Trade Cas.) ¶ 71576 (7th Cir. Oct. 22, 1965).

43 *Id.* at 81605.

price discrimination involve commodities of "like grade and quality." The legislative history of the original Clayton Act and the Robinson-Patman Act fails to disclose any clear interpretation of the language involving "grade" and "quality."⁴⁴ This problem of interpretation was recognized by Representative Celler when he stated that the numerous grades of industrial classification of a commodity like cotton could create not only confusion but also a distortion of the desired effect of the act.⁴⁵

Until recently, the FTC and most courts have determined whether commodities are of like grade and quality by examination of their physical properties. For example, in the earliest case, *Boss Mfg. Co. v. Payne Glove Co.*,⁴⁶ the court held that gloves could be separated into different grades by reason of their material composition and the workmanship or experience of the workers.

Nominal physical differences in appearance which would not contribute functionally are usually considered insufficient to exempt any price differential from the prohibitions of section 2(a) on the basis of the commodities not being of like grade and quality. What has constituted sufficient physical difference is a matter of fact and this *ad hoc* analysis has led to conflicting results. In *Bruce's Juices, Inc. v. American Can Co.*,⁴⁷ the question revolved around the size of tin cans used as containers for citrus juices. It was held in that case that a 3¾-inch tin can was of "like grade and quality" as a 3⅞-inch tin can because the two types of containers gave substantially identical performances. Also, in *McWhirter v. Monroe Calculating Mach. Co.*,⁴⁸ the court held that calculating machines were commodities of a like grade and quality if they were designed to add, subtract, multiply and divide and had keyboards with keys containing numerals and figures.

On the other hand, in *Champion Spark Plug Co.*,⁴⁹ the FTC held that the addition of nonfunctional ribs and the substitution of different insulation sufficiently altered the physical appearance and composition of the spark plug so as to prevent the application of section 2(a).

One of the major issues that has confronted the Commission and the courts is whether or not a private brand constitutes a sufficient differentiation so as to create a separate grade for a commodity that is otherwise physically identical. The FTC has consistently rejected any attempt to utilize a private label as a means of differentiating between commodities. In the first case, *Goodyear Tire & Rubber Co.*,⁵⁰ Goodyear sold its regular tires to the Sears

44 See generally Cassady & Grether, *The Proper Interpretation of "Like Grade and Quality" Within the Meaning of Section 2(a) of the Robinson-Patman Act*, 30 So. CAL. L. REV. 241 (1957); Rowe, *Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act*, 66 YALE L.J. 1 (1956).

45 Minority Statement, H.R. REP. No. 2287, 74th Cong., 2d Sess., pt. 2, at 11 (1936).

46 71 F.2d 768 (8th Cir. 1934).

47 87 F. Supp. 985 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir.), *modified*, 190 F.2d 73 (5th Cir.), *cert. denied*, 342 U.S. 875 (1951).

48 76 F. Supp. 456 (W.D. Mo. 1948).

49 50 F.T.C. 30 (1953).

50 22 F.T.C. 232 (1936), *rev'd and remanded*, 92 F.2d 677 (6th Cir. 1937), *rev'd per curiam*, 304 U.S. 257 (1938), *on remand*, 101 F.2d 620 (6th Cir. 1939). Because Congress amended § 2 of the Clayton Act while the original appeal was pending, the Sixth Circuit considered the issues moot and remanded to the Commission for further proceedings. However, on appeal by the FTC, the Supreme Court agreed with the Commission that the issues were not

Allstate Division at a substantial discount. Allstate then marketed these tires under its own brand name. The FTC challenged this transaction as being a violation of section 2(a), alleging that there was an excessive price differential between the sales under the private label of Allstate and Goodyear's sales of the same tire through its own distribution system. In an uncontested hearing the FTC held that the disadvantage of not being a brand name was not offset by the difference in price; hence, the products were held to be of like grade and quality.

In a more recent case, *United States Rubber Co.*,⁵¹ the FTC attacked the marketing of rubber-soled shoes under the defendant's brand of "U.S.," "Keds" and "Kedettes" and the contemporaneous sale to private distributors who marketed the shoes under their own brand. In holding these sales to be a violation of section 2(a), the Commission excluded any consideration of consumer preference and applied a strict physical test.

The view of the FTC that consumer preferences were not pertinent in determining whether goods are of "like grade and quality" has not been entirely endorsed by the courts. In *Atalanta Trading Corp. v. FTC*,⁵² a section 2(f) case, the court refused to accept the contention of the FTC that all hams were of like grade and quality. Although rejecting the cross-elasticity concept, the Second Circuit relied upon the minority report of the Attorney General's Committee in noting that certain types of hams were considered different in the eyes of the marketplace.

The Supreme Court has the opportunity to decide what test should be applied in *Borden Co. v. FTC*.⁵³ The FTC alleged that Borden sold its evaporated milk to marketers of private brands f.o.b. on a cost-plus basis at a price which was lower than the price charged to distributors of evaporated milk sold with Borden's label — all of which constituted a violation of section 2(a). On the retail level, Borden's label was considered to be a premium brand and consequently sold for more in spite of the fact that the evaporated milk was in all cases physically the same. In dismissing the cease and desist order against Borden the Fifth Circuit stated:

In determining whether products are of like grade and quality, consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional.

* * * *

It is only when those labels are proven to have demonstrable commercial significance that they can change the grade of the product. Different labels may be of no economic significance whatsoever. However, where it is demonstrated that a label enjoys a significant consumer acceptance such that buyers are willing to pay more for the product which bears that

moot and remanded for a decision on the merits. Upon remand, the Sixth Circuit set aside the Commission's original order and held that the number of tires sold to Allstate justified price differentiation.

⁵¹ 46 F.T.C. 998, 1006-09 (1950).

⁵² 258 F.2d 365 (2d Cir. 1958).

⁵³ 339 F.2d 133 (5th Cir. 1964), *cert. granted*, 382 U.S. 807 (1965).

brand, then it is clearly of commercial significance in the most direct and obvious way — namely, it causes the product to sell for a consistently higher price in a competitive market.⁵⁴

By the application of this test the Fifth Circuit held that a commercially significant distinction existed between the Borden label and the private brands. Therefore, the prohibitions of section 2(a) did not apply.

Considering economic realities, the Supreme Court should affirm the *Borden* case. To rely solely on physical distinctions is to ignore the tremendous expenditure on advertising and the desires of the consumer. If the consumer believes that a difference exists in the commodities, the requirement of equal prices creates a distortion in correlating the relative prices to the consumer's estimate of what is being received. A failure to accept different labels as being of different grades is an insult to the intelligence of the consumer.

G. Price Discrimination

There must be a discrimination in price for a violation of section 2(a). The Robinson-Patman Act does not contain a definition of either "discrimination" or "price." As a result of various judicial interpretations, "price" is the actual invoice price quotation by the seller, including prepaid freight, less any offsets against the invoice price.⁵⁵ This approach views price from a buyer's viewpoint rather than what the seller actually receives. This analysis is consistent with the primary purpose of the Robinson-Patman Act of preventing discrimination against disfavored buyers.

Both legislative history and dicta in *Automatic Canteen Co. of America v. FTC*⁵⁶ had supported the proposition that either a predatory intent or a competitive injury was a prerequisite to price discrimination. Then, in 1960 the Supreme Court clarified what constituted discrimination under section 2(a). Prior to *FTC v. Anheuser-Busch, Inc.*,⁵⁷ many considered the term "discrimination" to denote something more than a price difference. The facts in *Anheuser-Busch* were simple. Anheuser-Busch cut its price for beer in the St. Louis area market while maintaining its prices elsewhere. As a result, Anheuser-Busch's share of the St. Louis market increased from 12.5 percent to 39.3 percent. The Court held that price discrimination was merely a difference in price. The Court confined the relevance of predatory intent and competitive injury to other elements of section 2(a) rather than incorporating intent and injury into the concept of discrimination. From a statutory construction approach, this is the proper interpretation.

Unfortunately, the judicial equation of price difference with price discrimination does not, however, correspond with the economic concept of discrimination in price. The economists define price discrimination in relation to all relevant consideration which affect the seller's costs. Price discrimination, in the economic sense, occurs whenever price differences for the same product are

⁵⁴ *Id.* at 137-38.

⁵⁵ See, e.g., *Corn Prods. Refining Co. v. FTC*, 324 U.S. 726, 737 (1945). See ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT § 5.1 (1962).

⁵⁶ 346 U.S. 61 (1953).

⁵⁷ 363 U.S. 536 (1960).

not accounted for by differences in cost and level of demand or whenever the same price is charged despite cost differences. Economic costs are the key to economic price discrimination.

H. *Competitive Injury*

The final and most important element necessary to establish a *prima facie* violation of section 2(a) is the proof of a competitive injury. The price discriminations prohibited by section 2(a) are those whose effects *may* be:

- 1) substantially to lessen competition in any line of commerce; or
- 2) to tend to create a monopoly in any line of commerce; or
- 3) to injure, destroy, or prevent competition:
 - a) with any person who either knowingly receives the benefit of such discrimination; or
 - b) with customers of either.

Although the Robinson-Patman Act was designed to preserve competition on the customer level, three separate levels of competition are incorporated into the act. These have been characterized as follows: (1) primary—seller's level; (2) secondary—buyer's level; and (3) tertiary—level of the customer of the buyers. These three levels must be kept firmly in mind, since the cases view the type and degree of competitive injury differently in each tier of competition. The distinction among three statutory tests for competitive injury have not been important in price discrimination cases. A price differential which would "injure, destroy or prevent" competition with an individual on one of the three tiers would occur before the effect would spread throughout the entire line of commerce.

1. Primary Level

On the seller tier, to establish competition it is necessary to establish a competitive relationship between the discriminating seller and those adversely affected. Assuming a competitive relationship is demonstrated, the asserted injury must be *caused* by the price differential. Finally, there is the question of when the competitive injury is sufficient to violate section 2(a). The answer lies in whether the price discrimination was motivated by some illicit intent.

The probability of a competitive injury is increased if predatory intent is inferred from a consideration of all the circumstances. Price discrimination by quoting a low price in one locality while maintaining prices elsewhere is not predatory without the presence of other factors. The extent of a price cut is important. For example, in *Moore v. Mead's Fine Bread Co.*,⁵⁸ a fifty percent price cut was sufficient to infer competitive injury, in spite of the fact that the price cut was to break a boycott against its product. A clearer example is found in *E. B. Muller & Co. v. FTC.*⁵⁹ In that case a national concern instituted a price cut in the area where its only domestic competitor marketed its

⁵⁸ 348 U.S. 115 (1954).

⁵⁹ 142 F.2d 511 (6th Cir. 1944).

chicory. Evidence indicated that the competitor would be operating below costs to meet this price. From the fact that the price reduction was confined to the area in which its competitor sold its chicory and from the accompanying trade disparagement the court inferred that Muller was attempting to destroy its only domestic competitor.

A predatory or illicit intent is not generally inferred unless the selling price is near or below the seller's cost. As the Supreme Court has suggested "price reduction below costs tends to establish intent."⁶⁰ The danger in inferring an illegal intent from the relationship of prices and costs alone is that vigorous price competition tends to lower prices nearer costs. Normally the courts and the FTC examine the factual situation for other indications of intent to destroy a competitor, such as trade disparagement or pirating of key employees.

Nonpredatory price discrimination on the primary level requires a consideration of numerous factors involving the entire line of commerce. The earliest test of competitive injury on the primary level was the diversion theory which equated a shift in sales from one seller to another seller with adverse competitive injury. The diversion theory gave way to the requirement of a market dislocation in the Seventh Circuit decision in *Minneapolis-Honeywell Regulator Co. v. FTC*.⁶¹ In that case the following facts assumed prominence: (1) the total business of Minneapolis-Honeywell's competitors had increased; (2) its share of the thermostat control market had decreased from 73 percent in 1937-1938 to 60 percent in 1941; and (3) by 1941 Minneapolis-Honeywell had lost 53 percent of its previously standardized business on its controls. In reversing the FTC finding of an illegal price discrimination, the court stated:

M-H [Minneapolis-Honeywell] was entitled to meet the competition built in its field, and even if it did succeed in retaining or diverting some business which might otherwise have gone to some of its competitors, where those competitors were able to enter its field and build thriving businesses in spite of M-H's commanding position and alleged wrongful practices, we think it cannot be said that the effect of those practices was substantially to injure competition.⁶²

In the *E. Edelman & Co.*⁶³ case, the Commission accepted evidence of the existence of comparable discounts, the switching of customers and the rate of growth of all firms in a competitive relationship. It is clear that on the FTC level diversion of business alone is insufficient evidence of competitive injury on the primary level. One of the interesting yet confusing cases on competitive injury on the primary level involves the Anheuser-Busch Company's substantial price reduction in the St. Louis area. The FTC condemned this price reduction since it diverted business from its competitors — a throwback to the market diversion theory. The Seventh Circuit set aside the FTC order on the grounds that there was no illegal price discrimination unless Anheuser-Busch's customers outside of St. Louis were competitively injured.⁶⁴ The Supreme Court reversed

60 *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 552 (1960).

61 191 F.2d 786 (7th Cir. 1951), *cert. denied*, 344 U.S. 206 (1952).

62 *Id.* at 790.

63 51 F.T.C. 978 (1955).

64 265 F.2d 677 (7th Cir. 1959).

on other grounds.⁶⁵ On remand, the Seventh Circuit set aside the FTC's order on the merits.⁶⁶ In spite of substantial diversion of business, no competitive injury was found since the business shifts were temporary, the price cut was experimental (for almost two years), and Anheuser-Busch's market position had been declining. Furthermore, there was no evidence that the seller was financing discriminating prices from the profits gained elsewhere. Although the legislative history of the act and various courts have equated injury to competitors as injury to competition, *Anheuser-Busch* represents an attempt to clarify the relationship of these two types of injury. This case represents a recognition that the entire competitive atmosphere in the line of commerce is the subject of analysis — not the hardship of a single competitor.

The courts and, in most instances, the FTC have considered the price differential in nonpredatory situations in light of all relevant considerations in the seller's line of commerce. Although recent decisions have relied on a variety of different market factors, the following facts have been considered:

- 1) relative economic power of the discriminatory seller;
- 2) degree of ease of entry into the line of commerce by potential competitors of the discriminatory seller;
- 3) changes in the seller's percentage of the market as a result of the seller's price;
- 4) strength of the competitors of the seller in a particular locality, region and line of commerce;
- 5) existence of an intent to destroy sellers; and
- 6) whether the seller is experimenting with his price or the seller is seeking to increase his market share.⁶⁷

Such factors are indicative of the general competitive climate on the seller's level.

2. Secondary Level

The adverse competitive effects of the economic power of large purchasers to obtain lower prices were the primary evils sought to be corrected by the Robinson-Patman Act. To establish a competitive injury on the buyer level, there must be a harmful effect and the price discrimination must have caused the injury.

Illustrative of the typical secondary level case is *FTC v. Morton Salt Co.*⁶⁸ Morton Salt was one of the largest manufacturers of branded table salt in the United States and had a dual system of distribution, selling to wholesalers and to retailers. A system of quantity discounts was used. The higher rates of discount were available to carload purchasers only and those qualifying for the greatest discount were determined with respect to the total year's purchases. Only five chain stores qualified for the top rate of discount. Writing for the

⁶⁵ 363 U.S. 536 (1960).

⁶⁶ 289 F.2d 835 (7th Cir. 1961).

⁶⁷ See the summary of criteria suggested by ROWE, *op. cit. supra* note 55, § 7.4, at 160-61.

⁶⁸ 334 U.S. 37 (1948).

majority, Justice Black directly answered the question of when a price discrimination injures competition. He stated that where price differentials were substantial an inference could be drawn as to injury to competition. In spite of testimony and other evidence to the contrary, the majority inferred a competitive injury from the substantial price differences. The majority opinion also stated the price discrimination was illegal if there was a *reasonable possibility* of injury to competition. This was necessary for the use of the inference.

In another secondary level case, *E. Edelman & Co. v. FTC.*,⁶⁹ the seller manufactured and sold auto parts and supplies to jobbers, oil and tire companies and industrial users. A 20 percent discount on the company's brass products and a 15 percent discount on the company's glass and brake products were granted to forty warehouse distributors and to cooperatives that purchased twenty-eight percent of the company's volume. Not only did the court find that the competitive opportunities of the less favored purchasers were injured, but also it stated that no *de minimus* rule existed with respect to effect on competitive opportunities. The court stated that "it is implicit in the Act that discriminations which are negligible and which at best have a remote effect on competition are not within its prohibitions."⁷⁰

Both *Morton Salt* and *E. Edelman* relied on an inference of competitive injury if there were sufficient price differentials to influence the resale price. These are typical cases. Professor Rowe summarizes the existence of competitive injury on the secondary level as follows:

Essentially, adverse competitive effects are most likely inferred from stable price differentials *substantial in amount*, in the suppliers' sales of a *standardized product*, as between competing *resellers to the same trade*, which are in *keen competition*, and operate on *tight profit margins*. Conversely, the inference of competitive injury from a suppliers' price variations is remotest when the price spread is *minimal*, concerns a *tailored, specialized, or component product*, in an industry displaying *moderate competition* and *ample profits*.⁷¹

IV. Defenses

A. Cost Justification

Section 2(a) includes a provision designed to furnish an absolute defense to the proof of a prima facie case of price discrimination. The cost justification proviso declares that nothing in section 2(a) "shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such commodities are to such purchasers sold or delivered." The problems under this defense are numerous and complex, and do not lend themselves to an analysis in a survey. Until fairly recently the cost justification defense was but a myth, and even today it's still more of an illusion than the bedrock of economic rationality which the proviso was created to be.

69 239 F.2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958).

70 *Id.* at 155.

71 Rowe, *op. cit.* *supra* note 55, § 8.2, at 181.

The first completely successful use of the cost justification defense did not occur until the 1954 FTC decision in *B. F. Goodrich Co.*⁷² The actual practicality of utilizing the cost justification proviso is not only diminished by the prohibitive expense of preparing such evidence but also by the uncertainties of FTC acceptance of the method of classifying the cost data. The burden of proving this defense rests with the claimant.

In preparing a cost justification defense the seller has no administrative guidelines to follow, although the *Advisory Committee on Cost Justification Report*⁷³ is helpful. Perhaps the most important problem confronting the prospective client who might attempt to justify his discriminatory prices by reference to his cost is the difficulty of formulating a cost analysis.

First, the customers must be classified. Justice Clark, in *United States v. Borden Co.*, approved of class pricing if a "balance is struck by the use of classes for cost justification which are composed of members of such selfsameness as to make the averaging of the cost of dealing with the group a valid and reasonable indicium of the cost of dealing with any specific group member."⁷⁴ In the same case, Justice Douglas filed a special concurring opinion in which he advocated a "store by store costs" approach. A seller is at once faced with the dilemma of how to classify his customers. The cases do not give a clear answer, although grouping is apparently permissible.

Once a classification is determined, what costs are to be attributed to each group? How are overhead and the cost of capital to be allocated? Are both fixed and variable costs to be averaged? Finally, what should be the relationship between cost and price? These are all unanswered questions. The reason for the uncertainty lies in the disfavor with which the FTC views cost justification. Such a position is untenable in light of the history of the proviso and the fundamental economic reasoning that underlies the defense. In the future it will be the courts that will define and clarify the scope of the defense and means of proving cost justification.

B. Quantity Limits

As a corollary to the cost justification defense, a special proviso of section 2(a) permits the FTC to establish quantity limits for commodities after investigation, "where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce." This authorizes the FTC to impose a ceiling beyond which cost savings resulting from economical quantities, though not methods of manufacture and production, might be no longer reflected in lower prices.

The first use of the proviso by the FTC was the promulgation of a quantity limit for discounts in the sale of automobile replacement rubber tires and tubes.⁷⁵ After extended litigation, the FTC order was voided.⁷⁶ This litigation

⁷² For the judicial history of *Goodrich*, see note 50 *supra*.

⁷³ Advisory Committee on Cost Justification, Report to the Federal Trade Commission (Mimeo, 1956).

⁷⁴ 370 U.S. 460, 469 (1962).

⁷⁵ 16 C.F.R. § 310.1 (1960).

⁷⁶ *B. F. Goodrich Co. v. FTC*, 134 F. Supp. 39 (D.D.C. 1955), *aff'd*, 242 F.2d 31 (D.C. Cir. 1957).

developed principles including: (1) The quantity limit rule concerns only quantity whereas cost justification involves savings from manufacture, sale, or delivery resulting from different methods or quantities; (2) The FTC must find that the price differentials are unjustly discriminatory or promotive of monopoly, as well as the existence of only a few purchasers.

This proviso has been severely attacked as contravening the basic antitrust policy of sanctioning a form of administrative price fixing. The provision is contrary to the consumer interest as represented in the cost justification defense. Any future amendment of section 2(a) would probably delete this provision, and properly so.

C. *Selection of Customers*

Included in section 2(a) is the proviso permitting a seller to select his own customers in bona fide transactions which are not in restraint of trade. This clause adds little to the substantive prohibitions of the act as judicial decisions have consistently upheld the right of a seller to select with certain restrictions his own customers. A refusal to deal should be considered under section 3 of the Clayton Act rather than section 2(a).

D. *"Changing Conditions" Exemptions*

Price discriminations prohibited by section 2(a) may be justifiable under a proviso which exempts price changes "in response to changing conditions affecting the market for or the marketability of the goods concerned." Specific examples are included in the test—good faith "going out of business sales," court-ordered distress sales, sales of obsolescent seasonal goods and of perishable goods which are subject to imminent deterioration. This exemption was adopted to permit price changes and differences in dynamic and rapidly changing markets.

This defense has been rarely used and represents an uncharted area. Although there are two elements, changes affecting the market *for*, and changes in the marketability of goods, the cases involving this proviso focus on the marketability aspect. The FTC and judicial rulings have tended to confine the scope of this exemption to temporary situations caused by the physical nature of the commodity. In *Moore v. Mead's Fine Bread Co.*,⁷⁷ the Tenth Circuit rejected the contention that a boycott instituted by a competitor was a "changing condition." The provision was interpreted with respect to specific goods in special situations. A similar interpretation was used by the Ninth Circuit in *Balian Ice Cream Co. v. Arden Farms Co.*⁷⁸ The use of this defense was also denied in a price war situation.⁷⁹

This exculpatory provision must be recognized and treated as separate from the other defenses provided in sections 2(a) and 2(b). The "changing condition" exemption is presently applicable only to specific goods in special physical situations which are beyond the control of the discriminating seller. The *Attorney General's Report* adopts a broader interpretation:

77 208 F.2d 777 (10th Cir.), *rev'd*, 348 U.S. 115 (1954).

78 231 F.2d 356 (9th Cir. 1955).

79 *American Oil Co.*, 60 F.T.C. 1786 (1962).

The proviso should enable a seller to reflect such commercial adjustments in good faith by revised price quotations on short notice, though this may prejudice some customers who bought at less favorable prices in the immediate past. We equally recommend a realistic interpretation to protect a seller's flexibility in adapting his prices to perceptible market shifts, whether already under way or only impending.⁸⁰

Although the goal of permitting the seller enough flexibility to alter prices to compensate for dynamic market changes of both physical and commercial significance is laudable and economically rational, the question arises as to whether this proviso or section 2(b) is the proper mechanism.

E. Meeting Competition

No survey of section 2(a) is complete without reference to section 2(b), which declares that nothing in section 2 "shall prevent a seller from rebutting the prima facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor. . . ."⁸¹ This section and its predecessor was enacted to permit a national seller to *meet* the prices of local competitors.

One of the key controversies surrounding the Robinson-Patman Act is the relationship between sections 2(a) and 2(b). In *Standard Oil Co. v. FTC*⁸² the Supreme Court construed section 2(b) as an absolute defense against the section 2(a) prohibitions against price differentials. The court recognized that the good faith meeting of a competitor's equally low price could not alter the pre-existing competitive effects. The FTC has consistently sought to limit the scope of the meeting of competition defense.

The meeting of competition defense is available only after a prima facie case has been established. Then the discriminating seller has the burden of bringing himself within the exculpatory provisions of section 2(b). The element of good faith is not present if the price which the seller is meeting is unlawful. It is required that the seller must demonstrate the existence of circumstances which would lead a reasonable seller to believe that lower prices of the competitor were lawful.⁸³ The "good faith" aspect to section 2(b) is intermixed in substance with the "meeting of competition" phase of that section.

Section 2(b) is applicable only when the pricing practices are defensive in nature and are not for the purpose of "beating" the price of competitors. The FTC asserts that section 2(b) may be used defensively to keep an existing customer but not offensively to obtain a new customer.⁸⁴ The seller also has the obligation of proving the identity of his competitor and the pricing practices to which the seller is responding.⁸⁵

No more than a brief summary of this complex section has been attempted.

80 ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 179 (1955).

81 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1964).

82 340 U.S. 231 (1951).

83 *Standard Oil Co. v. FTC*, 340 U.S. 231, 238 (1951).

84 *Pacific Molasses Co.*, 3 TRADE REG. REP. ¶ 16223 (F.T.C. Dec. 17, 1962).

85 *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945); *Forster Mfg. Co.*, 3 TRADE REG. REP. ¶ 17304 (F.T.C. July 29, 1965).

The prohibitions against price discrimination are economically feasible only when read in *pari materia* with a strong and readily available meeting of competition defense.

V. Conclusion

The foregoing has been a survey of the elements of a prima facie case of price discrimination under section 2(a) and the relevant defenses available once a prima facie case has been established. An analysis in depth of the statutory structure of section 2(a) has not been attempted, nor has a philosophical critique been undertaken. If any lesson can be derived from this survey, it is that section 2(a) of the Robinson-Patman Act is an exceedingly complex and intricate piece of legislation. Although such statutory complexities are a boon to the legal profession, the business community, which must live with the prohibitions and penalties of the act, is faced with uncertainty in formulating a pricing policy. It is submitted that prices should be determined by the demands of the market rather than by the businessman's fear of violating the prohibition against price fixing. It is the obscurity of the meaning of section 2(a) and complexity of the provisions which dictate a complete examination of this statute.